



PAT LEARY
ACTING DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • www.cdss.ca.gov



GAVIN NEWSOM
GOVERNOR

March 28, 2019

Via Federal eRulemaking Portal

The Honorable Sonny Perdue, Secretary
Mr. Brandon Lipps, Administrator
Certification Policy Branch
Program Development Division
Food and Nutrition Services
United States Department of Agriculture
3101 Park Center Drive
Alexandria, Virginia 22302

SUBJECT: COMMENTS ON PROPOSED RULE: FNS DOCKET ID: FNS-2018-0004;
SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: REQUIREMENTS FOR
ABLE-BODIED ADULTS WITHOUT DEPENDENTS, 84 FED. REG. 980 (FEBRUARY
1, 2019), RIN 0584-AE57

Dear Secretary Perdue and Administrator Lipps:

The California Department of Social Services (CDSS) submits the following comments for your consideration on the Proposed Rule entitled, *Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents*, (84 Fed. Reg. 980 (February 1, 2019)), RIN 0584-AE57 (Proposed Rule).

In California, the Supplemental Nutrition Assistance Program (SNAP), known in California as CalFresh, is overseen by CDSS and administered by the State's 58 County Health and Human Services Agencies. CalFresh provides nearly 4 million Californians, including 2 million children, with food benefits each month. These benefits are spent at grocery stores and farmers' markets across the state, generating more than \$12 billion in economic activity annually.

As the responsible state agency, CDSS strives to assure accurate and effective implementation of CalFresh in an effort to provide the best possible services to the individual recipients who rely on these benefits. In accordance with the statutory purpose of SNAP, CDSS prioritizes efforts to eradicate malnutrition and hunger and increase employment opportunities.¹ CDSS strongly believes that food stability is key to an individual's ability to gain adequate employment and is key to enhancing the health and well-being of children and families.

¹ 7 U.S.C. §§ 2011, 2025.

Contrary to these objectives, if implemented in its current form, the Proposed Rule would directly and adversely impact the health and well-being of hundreds of thousands of Californians, result in significant financial losses for the State's retail and agricultural industries, frustrate the State's efforts to improve SNAP Employment & Training (CalFresh Employment & Training) services, and create an insurmountable administrative burden for the State.

In addition to its many negative repercussions, the Proposed Rule violates the Administrative Procedures Act (APA). It arbitrarily and capriciously seeks to alter longstanding regulation, as it fails to provide reasonable, logical, or evidentiary bases for the changes.² It lacks sufficient impact analyses and ignores important aspects of the problems it purports to address.³ Perhaps most importantly, the Proposed Rule directly conflicts with the congressional intent recently evidenced by the passing of the Agriculture Improvement Act of 2018 (Farm Bill). The changes of the Proposed Rule were considered and rejected by Congress.⁴ The Proposed Rule therefore exceeds the United States Department of Agriculture's (USDA or Department) rule making authority by contradicting Congress' intent.

Thus, CDSS strongly opposes the Proposed Rule and requests that the USDA and the Food and Nutrition Service (FNS) withdraw it.

The Proposed Rule Will Increase Hunger and Aggravate Employment Barriers

The Proposed Rule states that broad application of the ABAWD time limit "would encourage greater engagement in meaningful work activities and movement toward self-sufficiency among ABAWDs".⁵ However, the Department fails to provide any evidence to support this assertion. It repeats this unsubstantiated assertion multiple times, while also predicting a savings in SNAP benefits of approximately \$1.7 billion per year. This illogical and unsupported series of claims fails to provide the reasoned explanation required under the APA.⁶ Contrary to the Department's assertions, the Proposed Rule imposes requirements on individuals in need of food, regardless of

² See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (holding that agencies must "provide a reasoned explanation for the change" to regulations").

³ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983) (holding that a rule is arbitrary and capricious if the agency fails to consider an important aspect of the problem or offers an explanation that contradicts the evidence before the agency).

⁴ *Joint Explanatory Statement of the Committee of Conference: Agriculture Improvement Act of 2018*, 115th Cong. (2018),

<https://docs.house.gov/billsthisweek/20181210/Joint%20Explanatory%20Statement.pdf>.

⁵ 84 Fed. Reg. at 982.

⁶ *Encino v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

available jobs and training in the region, their individual skills and barriers, and their access to work supports like child care.

Despite its stated goal to increase self-sufficiency, the Proposed Rule limits California's continuing efforts to expand CalFresh employment and training programs, which lead to greater self-sufficiency. In the last several years, California has nearly doubled the number of individuals served through CalFresh Employment & Training (CalFresh E&T) and has made significant strides toward improving the quality of services available to participants. CalFresh E&T seeks to increase the employment and earning capacity of CalFresh recipients by providing more recipients with access to valuable work experience, education, and training. The Department has previously stated its prioritization of SNAP E&T (CalFresh E&T) and has recently invested additional funding to support States in expanding the quantity of people served and the quality of services offered. Unfortunately, even with this funding and California's efforts to expand services, CalFresh E&T does not have the capacity to provide services to all of the hundreds of thousands of ABAWDs that would be suddenly subject to the time limit as a result of the Proposed Rule. As a result, many ABAWDs would be discontinued from CalFresh prior to having access to CDSS' expanding CalFresh E&T services, and they would be deprived of the very food stability necessary to gain employment.

The Proposed Rule incorrectly assumes that ABAWDs are unemployed or underemployed as a result of a lack of motivation. In doing so, the Department fails to consider the many barriers to employment that exist for many low-income childless adults. One-third have a mental or physical limitation, including depression, post-traumatic stress disorder, mental or learning disabilities, or physical injuries. Some of these disabilities, though not severe enough to qualify for federal disability benefits, may still limit an individual's ability to work more than 20 hours a week. More than 40 percent lack access to reliable private or public transportation, and 60 percent lack a valid driver's license. Fifteen percent need supportive services like language interpretation or help with transportation to obtain employment.

The Department also fails to consider that women and people of color are disproportionately impacted by unemployment and underemployment. Nationally, the demographics of the ABAWD population are very diverse. Approximately 45 percent are women. Among those who report their race, a third are African American and a tenth are Hispanic.⁷ People of color and women face employment discrimination that contributes to higher-than-average unemployment, irrespective of their education level or criminal history. Generally, unemployment rates tend to be higher for African Americans. In 2017, the rate for African American men over 16 years old was 7.5

⁷ CENTER ON BUDGET AND POLICY PRIORITIES, MORE THAN 500,000 ADULTS WILL LOSE SNAP BENEFITS IN 2016 AS WAIVERS EXPIRE (MARCH 18, 2016), <https://www.cbpp.org/research/food-assistance/more-than-500000-adults-will-lose-snap-benefits-in-2016-as-waivers-expire>.

percent, compared to an overall rate for men over 16 of 4.4 percent. In California, the unemployment rate for African Americans is 2 percent higher than the overall State unemployment rate.⁸ The Proposed Rule's failure to adequately consider these societal disparities, coupled with its unsubstantiated claims that unemployed or underemployed ABAWDs simply need encouragement, fails to recognize or address the needs of the populations to be served.

The Proposed Rule does not support adults in finding gainful employment and overcoming barriers. In fact, it does the opposite. Limiting access to food assistance does not support underemployed and unemployed individuals in finding work. Hunger is a barrier to employment. CalFresh food benefits help people meet their nutritional needs and lessen the financial impacts of having to buy food each month, which is a burden to those who are unemployed or working for low wages. When people can afford nutritious food, they are better prepared to learn and develop the skills necessary to obtain higher-paying jobs.

The Proposed Rule Would Lead to Inaccurate Determinations of the Availability of Jobs

Under Title 7 of the U.S. Code section 2015, waivers may be approved for "any group of individuals in the State if the Secretary makes a determination that the area in which the individuals reside -- [...] does not have a sufficient number of jobs to provide employment for the individuals". The Proposed Rule significantly limits the evidence States may provide in order to demonstrate a lack of jobs. It also develops a "floor" for unemployment rates. The Department asserts that these changes are intended to "improve consistency across States and only allow approvals in areas where waivers are truly necessary."⁹ However, these proposals will only lead to inaccurate determinations of job availability as they do not allow for the submission of relevant information or provide States with the ability to make determinations about local economies.

By limiting waiver evidence to data from the Federal Bureau of Labor Statistics (BLS) or a BLS-cooperating agency, the Department unreasonably excludes other valuable sources of information. The Proposed Rule provides no reasoning why it cannot or should not continue to consider supplemental data from other sources to establish regional unemployment rates. It also limits consideration of non-BLS data and evidence to "exceptional circumstances". Neither of these proposed changes are supported by a satisfactory explanation for why the current rule is insufficient.

⁸ CA EMPLOYMENT DEVELOPMENT DEP'T, CALIFORNIA DEMOGRAPHIC LABOR FORCE, SUMMARY TABLES (JANUARY 2019),

https://www.labormarketinfo.edd.ca.gov/specialreports/CA_Employment_Summary_Table.pdf.

⁹ 84 Fed. Reg. at 983.

The Department's proposed unemployment floor for the 20 percent standard fails to consider several important factors. The Department asserts that an unemployment floor is necessary as States continue to receive waivers, even though the national unemployment rate has dropped since the Great Recession. This assertion is flawed, as the current waiver rules have been in place since before the Great Recession and States are receiving more limited waivers each year, as their local unemployment rates improve.¹⁰ In other words, the current rule is addressing improving economies, but is doing so in a way that better suits local economic realities and barriers to employment than the Proposed Rule would. As previously discussed, unemployment rates do not accurately reflect an ABAWD's ability to obtain employment. As such, the current rule allows States to properly consider local circumstances when they continue to apply for waivers. California chooses not to comment on whether a floor of 6, 7, or 10 percent would be best, as it is unnecessary for any such floor to be implemented. The Department has failed to provide a satisfactory explanation for this proposed change.

For Effective Administration, Federal Regulations Must Be Responsive to State Economic and Workforce Needs

California faces unique and ever-changing challenges due to its geographic and economic diversity; its size; and the racial, linguistic, and socio-economic diversity of individuals within the State. As such, CDSS must be able to respond to localized needs for accurate and effective administration of SNAP employment rules and services in this State. The Proposed Rule repeatedly refers to state flexibility as a negative attribute of the current rules, suggesting that States have abused this flexibility, without providing any evidence to support this claim. In proposing more restrictive policies, the Department fails to acknowledge and account for the varied economic and workforce circumstances that each of the States, territories, and D.C. must address and the important purpose state discretion in employment policies serves.

One example of a restriction that adversely impacts the State's ability to address unique circumstances is the Proposed Rule's elimination of grouped areas, except those areas that are designated Labor Market Areas (LMAs) by BLS. It claims that States have been inappropriately grouping high-unemployment areas and excluding other low-unemployment areas in an effort to receive waivers. Such a significant limitation on which waivers can be requested and approved is contrary to the broad statutory language, which refers to "any group of individuals" and the "area in which the individuals reside".¹¹ Additionally, the Proposed Rule fails to consider the fact that the State is often better suited to identify how certain areas are interrelated and why more prosperous adjacent areas may not be an appropriate addition to a grouping. This limitation is unnecessary, unfounded, and overly burdensome.

¹⁰ *Id.* at 982.

¹¹ 7 USCS § 2015(o)(4)(A).

Similarly, the proposed limitation on statewide waivers when substate data is available through BLS ignores States' expert understanding of local circumstances. A state may have one or two regions of relatively low unemployment, but it could be that those areas are closely economically tied to surrounding regions, so a substate analysis is not appropriate in that case. This requirement also creates unnecessary administrative burdens for the State.

The Proposed Rule's elimination of the unlimited percentage exemption carryover would impede the States' ability to address unique case circumstances. Although the Proposed Rule suggests repeatedly that States are taking advantage of a system that offers too much flexibility, the accrual of percentage exemptions demonstrates States' historical restraint when granting a percentage exemption to an ABAWD. These exemptions allow eligibility workers to ameliorate the impact of the time limit at the individual level on a case-by-case basis. The ability to retain unused exemptions serves two additional important purposes in California. First, it provides flexibility to counties as they begin implementing the ABAWD time limit and allows them to provide an extension of nutrition benefits and support to ABAWDs who were not yet prepared for the change in eligibility rules. Second, it provides the State with a safety net for emergency local economic hardships that may not rise to the level of a new waiver. For example, if a disaster or temporary work stoppage badly impacts one community, these exemptions would allow the State and County to create the equivalent of a mini-waiver to address the immediate need.

The Department provides no evidence that the exemptions are being misused, that this change is needed, or that the accrual is contrary to congressional intent, because no such evidence exists. In developing and passing the Farm Bill, Congress reviewed the current exemption rules and decided to change the allocation percentage from 15 to 12, but chose not to make changes to the "carryover".¹² As such, this proposed change is not only in violation of the APA, but it exceeds the Secretary's rulemaking authority as it conflicts with congressional intent.

The Proposed Rule Impairs State Operations and Creates Insurmountable Administrative Burdens

The Department fails to adequately consider the impact many of its proposals would have on state operations and the administration of the program. For example, the Proposed Rule eliminates the States' ability to implement prior to waiver approval and limits waivers to one year. While appearing reasonable, these two proposals fail to acknowledge the time it takes for waivers to be approved and the time needed to prepare for implementation of the ABAWD time limit in a region that has been under

¹² Agriculture Improvement Act of 2018, S. 3042, 115th Cong. (2018).

waiver in the preceding years. For reference, California submitted a waiver application for the period beginning in September 2018 to FNS in September of 2017 and did not receive approval from FNS until July of 2018. Given this delay in processing, these two proposals are impractical and no reasonable basis is given for their implementation.

The Proposed Rule would require the governors of each state to approve all ABAWD time limit waiver requests. This is an unnecessary and burdensome administrative requirement that serves no purpose. The Department asserts that this administrative requirement is necessary to “ensure that such a critical request is supported at the highest levels of State government”.¹³ However, this requirement is an abuse of discretion and a clear overreach by the Department. States have internal procedures and standards for what must be approved by their governors prior to submission or publication. It is not the place of the Department to interfere with internal state processes.

The proposed implementation date of October 1, 2019 would provide an inadequate and unrealistic amount of time for States to prepare for the expiration of the ABAWD time limit waivers and the widespread implementation of the ABAWD time limit. If the Proposed Rule were implemented in its current form, California estimates that it would have to implement the ABAWD time limit in over fifty counties on the same day (October 1, 2019). For reference, California implemented the ABAWD time limit in three counties in fall of 2018 and spent over a year preparing at both the state and county level. Implementation in just three counties required new policy guidance, significant training efforts, substantial automation, and the production of county and state ABAWD implementation plans.¹⁴ Most importantly, implementation of the ABAWD time limit rules requires special notice to impacted individuals.¹⁵ The October 1, 2019 implementation date would not provide sufficient time for the State to coordinate with counties, identify ABAWDs, and provide notice. This unreasonable timeframe for such a sizeable change in policy, will lead to increased Quality Control (QC) error rates, an inability to properly serve clients, and the potential for violations of individuals’ procedural due process rights.¹⁶

¹³ 84 Fed. Reg. at 983.

¹⁴ The State ABAWD time limit implementation plan is required by FNS due to the substantial and unique operational burdens associated with it.

¹⁵ Lizbeth Silbermann, [SNAP – Requirements for Informing Households of ABAWD Rules](#), United States Department of Agriculture, Food and Nutrition Service (April 17, 2017); Lizbeth Silbermann, [SNAP -Best Practices and Resources for Informing Households of ABAWD Rules](#), United States Department of Agriculture, Food and Nutrition Service (April 17, 2017).

¹⁶ Lizbeth Silbermann, [Supplemental Nutrition Assistance Program – ABAWD Time Limit Policy and Program Access](#), United States Department of Agriculture, Food and Nutrition Service (November 19, 2015).

Under the current ABAWD time limit waiver criteria, California anticipates implementing the ABAWD time limit statewide progressively over several years. This staggered implementation allows CDSS to provide the necessary oversight and guidance to each implementing county and education to each client. The Proposed Rule seeks to disqualify all but a limited number of California counties from the waiver simultaneously. Given this impact, an implementation date of several months past October or even in October 2020, would still require the State to implement this new and complex rule in dozens of counties with hundreds of thousands of clients at the same time. Such an overly burdensome implementation process will also negatively impact client understanding of a complex eligibility rule. This Proposed Rule leaves little doubt that California clients will be unnecessarily subjected to heightened errors in benefit administration and consequently the State will be subjected to heightened Quality Control (QC) error rates and potential penalties if forced to implement in the manner prescribed.

The Proposed Rule Fails to Complete the Required Analyses

Executive Orders 12866 and 13563 require agencies to “assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).”¹⁷ The Proposed Rule focuses on the Office of Management and Budget’s estimated savings in federal spending and the number of individuals who will no longer be eligible to receive SNAP benefits – a purported benefit – but fails to consider the true “net” costs and benefits. The Proposed Rule fails to consider the impact on public health and increased health care costs when individuals no longer receive proper nutrition. It also fails to acknowledge the disparate impact these changes would have on vulnerable populations, such as communities of color, adults with disabilities, and young adults attempting to find gainful employment, especially those aging out of the dependency system. Further, food security is key to employment, yet the Proposed Rule counts the elimination of food security, and therefore the resulting decline in employment, as a benefit of the rule.

While the Proposed Rule presents decreased SNAP payments as a “savings” we adamantly disagree. In creating SNAP, Congress found “that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation’s agricultural abundance and will strengthen the Nation’s agricultural economy, as well as result in more orderly marketing and distribution of foods.”¹⁸ Not only does SNAP improve educational outcomes, increase self-sufficiency, help individuals out of poverty, and improve the

¹⁷ 84 Fed. Reg. at 989.

¹⁸ 7 U.S.C. § 2011.

health of recipients and their families, money spent on SNAP is money spent on the agricultural, food, and retail industries. Each year, SNAP benefits lead to tens of thousands of jobs in California alone.¹⁹ From farmers' market vendors to large-scale agricultural producers, businesses in the agricultural industry benefit from the use of SNAP benefits.²⁰ If eligible individuals do not receive SNAP, then each dollar "saved" as a result of this Proposed Rule, is a dollar kept from our country's food and farm industry.

California's food banks distribute federal Emergency Food Assistance Program commodities to over 1.5 million people each month, via networks of hundreds of community charities and congregations. Individuals who are no longer eligible for SNAP will still need food and will turn to food banks' supply of federal, purchased, and donated food boxes. But food banks do not have the capacity to address a new significant need of this kind. Given these "net" impacts, the Department must conduct and provide further analysis that truly meets the requirements of these Executive Orders.

Similarly, under Executive Order 13771, the Department is required to "reduce regulation and control regulatory costs and provide[] that the cost of planned regulations be prudently managed and controlled through a budgeting process."²¹ The Proposed Rule states that it is "deregulatory" and does not include any new costs. It instead finds that States will experience a savings. This wholly disregards the fact that the proposed changes will subject States to more regulations as they will no longer be eligible for statewide or partial waivers. The costs of automation and training alone, especially on this timeline, will be exorbitant.

Finally, the Proposed Rule's Civil Rights Impact Analysis is wholly insufficient. While the analysis is required in order "to identify and address any major civil rights impacts the Proposed Rule might have on minorities, women, and persons with disabilities", the Proposed Rule only provides a cursory acknowledgement that there may be a disparate impact.²² As discussed above, the implementation of the ABAWD time limits will disproportionately impact women, people of color, and individuals with disabilities. As such, a more robust discussion of these issues, with supporting evidence, is required. The Department's claim that vague mitigation strategies will lessen the impacts is insufficient and must be addressed in greater detail.

¹⁹ CALIFORNIA ASSOCIATION OF FOOD BANKS, THE ECONOMIC AND ANTI-HUNGER VALUE OF SNAP (CALFRESH) (2016),

http://www.cafoodbanks.org/sites/default/files/factsheet_econantihungersnap_hyperlinks_121916.pdf.

²⁰ CALIFORNIA FOOD POLICY ADVOCATES, LOST DOLLARS, EMPTY PLATES, THE IMPACT OF CALFRESH ON STATE AND LOCAL ECONOMIES (2016), <https://cfpa.net/CalFresh/CFPAPublications/LDEP-FullReport-2016.pdf>.

²¹ 84 Fed. Reg. at 990.

²² *Id.*

The Honorable Sonny Perdue
Mr. Brandon Lipps
Page 10

In enacting the Farm Bill, Congress chose which of the current ABAWD waiver and exemption policies to keep and which to change. The Proposed Rule contravenes congressional intent and fails to provide satisfactory reasons for its burdensome and unfair proposals. CDSS strongly opposes the Proposed Rule entitled *Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents* and requests that the Department withdraw it. California is committed to improving nutrition and employment outcomes, expanding CalFresh E&T services and accurately implementing the ABAWD time limit rules in the regions ineligible for waivers under the current regulations. CDSS encourages the Department to continue its own work to achieve these goals throughout the country.

Thank you for your consideration of these points.

Sincerely,



KIM MCCOY WADE
Branch Chief
CalFresh and Nutrition Branch